Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-9–01 OF 2020
KAMALUDIN MD SAID, DARRYL GOON AND HASHIM HAMZAH JJCA
22 MARCH 2023

Civil Procedure — Appeal — Appeal against High Court's decision — High Court allowed order of certiorari and quashed decision of first respondent on grounds of illegality and irrationality — Whether High Court may decide on issue of legality even though parties did not canvass issue either in proceeding before first respondent and High Court below

This was the appellant's appeal against the decision of the learned High Court judge ('HCJ') on a judicial review application filed by the appellant against the respondents. The appellant was a housing developer for a project known as 'Foresta Damansara Condominium' ('the condominium'), whereas the second and third respondents were the purchasers of a unit ('the unit') in the condominium. On 28 June 2012, the appellant entered into a sale and purchase agreement with the second and third respondents ('the SPA'). It was agreed between the parties in the SPA, among others, that: (a) the appellant shall deliver vacant possession of the unit to the second and third respondents within 42 calendar months from the date of the SPA, as seen in cl 25(1) of the SPA; and (b) the appellant shall complete the condominium's common facilities within 42 calendar months from the date of the SPA, as seen in cl 27(1) of the SPA. The appellant gave a discount of RM63,598 to the second and third respondents through a credit note ('the rebate'). Through a letter dated 22 December 2015, the appellant notified the second and third respondents to take delivery of vacant possession of the unit. The second and third respondents filed a claim against the appellant before the first respondent, claiming liquidated damages amounting to RM44,279.78 due to the appellant's delay in delivering vacant possession of the unit and completing the common facilities. On the other hand, the appellant filed a counterclaim before the first respondent against the second and third respondents for the refund of the rebate. The first respondent allowed the second and third respondents' claim and awarded, among others, for the appellant to pay RM41,134.22 to the second and third respondents as liquidated damages for late delivery of vacant possession of the unit. Aggrieved, the appellant filed a judicial review application to the High Court claiming the following reliefs, among others, for an order of certiorari to quash the first respondent's decision and an order for the second and third respondents to refund the rebate to the

appellant. The appellant's judicial review was allowed in part where the learned HCJ: (i) allowed an order of certiorari and quashed the decision of the first respondent on the grounds of illegality and irrationality; and (ii) allowed the second and third respondents' claim for liquidated damages of RM39,327.10. The sum was computed from the date of the SPA, inclusive of the second and third respondents' claims for late delivery of vacant possession and late completion of the common facilities. Dissatisfied, the appellant filed this appeal.

Held, dismissing the appeal:

(1) The learned HCJ was entitled to take cognisance of the issue of illegality even though the parties did not allude to any illegality before him. The court was duty-bound to take cognisance of illegality, as the court should not knowingly be a party to the enforcement of an unlawful agreement. There was no reason to disturb the findings of the learned HCJ that the 36 month period as stipulated in Schedule H for the delivery of vacant possession and the completion of the common facilities shall apply to the SPA as statutorily and mandatorily required by reg 11(1) of the Housing Development (Control and Licensing) Regulations 1989. In awarding the sum of RM39,327.10 to be paid by the appellant to the second and third respondents, the learned HCJ had considered and less the rebate and the 36 month period was to commence from the date of the SPA. The learned HCJ's decision was just and reasonable (see paras 24–25, 28 & 31).

[Bahasa Malaysia summary

Ini adalah rayuan perayu terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang bijaksana mengenai permohonan semakan kehakiman yang difailkan oleh perayu terhadap responden. Perayu merupakan pemaju perumahan untuk projek yang dikenali sebagai 'Foresta Damansara Condominium' ('kondominium'), manakala responden kedua dan ketiga adalah pembeli unit ('unit') di kondominium tersebut. Pada 28 Jun 2012, perayu telah menandatangani perjanjian jual beli dengan responden kedua dan ketiga ('PJB'). Telah dipersetujui antara pihak-pihak dalam PJB, antara lain, bahawa: (a) perayu hendaklah menyerahkan milikan kosong unit tersebut kepada responden kedua dan ketiga dalam tempoh 42 bulan kalendar dari tarikh PJB, seperti yang dilihat dalam klausa 25(1) PJB; dan (b) perayu hendaklah melengkapkan kemudahan bersama kondominium itu dalam tempoh 42 bulan kalendar dari tarikh PJB, seperti yang dilihat dalam klausa 27(1) PJB. Perayu memberikan diskaun sebanyak RM63,598 kepada responden kedua dan ketiga melalui nota kredit ('rebat'). Melalui surat bertarikh 22 Disember 2015, perayu memaklumkan responden kedua dan ketiga untuk mengambil penghantaran milikan kosong unit tersebut. Responden kedua dan ketiga memfailkan tuntutan terhadap perayu di

hadapan responden pertama, menuntut ganti rugi yang ditentukan berjumlah RM44,279.78 disebabkan oleh kelewatan perayu menyerahkan milikan kosong unit itu dan melengkapkan kemudahan bersama. Sebaliknya, perayu memfailkan tuntutan balas di hadapan responden pertama terhadap responden kedua dan ketiga untuk pemulangan rebat. Responden pertama membenarkan tuntutan responden kedua dan ketiga dan menganugerahkan, antara lain, untuk perayu membayar RM41,134.22 kepada responden kedua dan ketiga sebagai ganti rugi yang ditentukan kerana lewat penghantaran milikan kosong unit itu. Terkilan, perayu memfailkan permohonan semakan kehakiman kepada Mahkamah Tinggi dengan menuntut relif berikut, antara lain, untuk perintah certiorari untuk membatalkan keputusan responden pertama dan perintah untuk responden kedua dan ketiga membayar balik rebat kepada perayu. Semakan kehakiman perayu dibenarkan sebahagiannya di mana HMT yang bijaksana: (i) membenarkan perintah certiorari dan membatalkan keputusan responden pertama atas alasan menyalahi undang-undang dan tidak rasional; dan (ii) membenarkan tuntutan responden kedua dan ketiga untuk ganti rugi yang ditentukan sebanyak RM39,327.10. Jumlah itu dikira dari tarikh PJB, termasuk tuntutan responden kedua dan ketiga untuk penghantaran lewat milikan kosong dan kelewatan menyiapkan kemudahan bersama. Tidak berpuas hati, perayu memfailkan rayuan ini.

Diputuskan, menolak rayuan:

(1) HMT yang bijaksana berhak untuk mengambil tahu tentang isu menyalahi undang-undang walaupun pihak-pihak tidak merujuk kepada mana-mana kesalahan undang-undang sebelum beliau. Mahkamah berkewajipan untuk mengambil tahu tentang kesalahan undang-undang, kerana mahkamah tidak seharusnya secara sedar menjadi pihak dalam penguatkuasaan perjanjian yang menyalahi undang-undang. Tiada sebab untuk mengganggu penemuan HMT yang bijaksana bahawa tempoh 36 bulan seperti yang ditetapkan dalam Jadual H untuk penghantaran pemilikan kosong dan penyiapan kemudahan bersama hendaklah terpakai kepada PJB seperti yang dikehendaki secara berkanun dan mandatori oleh peraturan 11(1) Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Pelesenan) 1989. Dalam menganugerahkan jumlah RM39,327.10 yang perlu dibayar oleh perayu kepada responden kedua dan ketiga, HMT yang bijaksana telah mempertimbangkan dan menolak rebat tersebut dan tempoh 36 bulan itu adalah bermula dari tarikh PJB. Keputusan HMT yang bijaksana adalah adil dan munasabah (lihat perenggan 24, 25, 28 & 31).]

Cases referred to

Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals [2020] 1 MLJ 281; [2020] 1 CLJ 162, FC (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1, PC (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 25(1), (2), Schedule, para 1
Housing Development (Control and Licensing) Act 1966 s 24, (2)(c), (2)(e)
Housing Development (Control and Licensing) Regulations 1989 reg 11(1), (3), Schedule H
Rules of Court 2012 O 1A, O 2 r 1(2), O 53, O 53 r 2(3)

Appeal from: *Sri Damansara Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Ors* [2020] MLJU 170 (High Court, Shah Alam)

Saroop Rampal a/p Hardyal Rampal (with Dhiren Rene Norendra) (Norendra & Yap) for the appellant.
Ariadne Lee (Pei Chambers) for the second and third respondents.

Hashim Hamzah JCA:

INTRODUCTION

[1] This is the appellant's appeal against the decision of the learned High Court judge ('HCJ'), which was delivered on 6 December 2019, on a judicial review application filed by the appellant against the respondents under O 53 of the Rules of Court 2012 ('the ROC 2012').

BRIEF FACTS

[2] The facts of this case can be gleaned from the learned HCJ's grounds of decision, the submissions by the respective parties, and the appeal records. We respectfully adopt them with some modifications where necessary.

[3] The appellant is a housing developer for a project known as 'Foresta Damansara Condominium' ('condominium'), whereas the second and third respondents are the purchasers of Unit No A-11–07 ('unit') in the said condominium.

[4] On 6 January 2012, the second respondent paid RM10,000 to the appellant as part payment of the purchase price ('part payment'), which was agreed at RM735,980 ('purchase price').

[5] By way of a letter dated 13 February 2012, the second respondent requested the appellant to add the third respondent as co-purchaser.

A **[6]** On 28 June 2012, the appellant entered into a sale and purchase agreement with the second and third respondents ('SPA'). It was agreed between the parties in the SPA, among others, that:

(a) the appellant shall deliver vacant possession of the said unit to the second and third respondents within 42 calendar months from the date of the SPA, as seen in cl 25(1) of the SPA; and

B

(b) the appellant shall complete the condominium's common facilities within 42 calendar months from the date of the SPA, as seen in cl 27(1) of the SPA.

C

[7] The appellant gave a discount of RM63,598 to the second and third respondents through a credit note dated 17 July 2012 ('rebate').

D **[8]** Through a letter dated 22 December 2015, the appellant notified the second and third respondents to take delivery of vacant possession of the said unit.

E **[9]** The second and third respondents filed a claim against the appellant before the first respondent, claiming liquidated damages amounting to RM44,279.78 due to the appellant's delay in delivering vacant possession of the unit and completing the common facilities. On the other hand, the appellant filed a counterclaim before the first respondent against the second and third respondents for the refund of the rebate.

F

[10] After hearing both parties, the first respondent allowed the second and third respondents' claim and awarded, among others, for the appellant to pay RM41,134.22 to the second and third respondents as liquidated damages for late delivery of vacant possession of the unit.

G

[11] Aggrieved with the first respondent's award, the appellant filed a judicial review application to the High Court (after being granted leave), claiming the following reliefs, among others, for an order of certiorari to quash the first respondent's decision and an order for the second and third H respondents to refund the rebate to the appellant.

[12] After hearing all parties' submissions, the learned HCJ allowed the appellant's judicial review in part. The learned HCJ allowed an order of certiorari and quashed the decision of the first respondent on the grounds of I illegality and irrationality.

[13] Be that as it may, the learned HCJ allowed the second and third respondents' claim for liquidated damages of RM39,327.10. The sum was computed from the date of the SPA, inclusive of the second and third

respondents' claims for late delivery of vacant possession and late completion of the common facilities.

[14] Dissatisfied, the appellant filed this appeal.

[15] After perusing the appeal records and hearing the parties' submissions, we have unanimously decided to dismiss the appeal. The decision of the High Court was affirmed, and the parties were ordered to bear their own costs. The reasons behind our decision are set out below.

OUR FINDINGS

[16] The core issue in the present case is whether the learned HCJ may decide on the issue of the legality of the extension of time granted by the Housing Controller for the delivery of vacant possession of the said unit even though the parties did not canvass this issue either in the proceeding before the first respondent and the learned HCJ below.

[17] At the outset, s 24 of the Housing Development (Control and Licensing) Act 1966 (Act 118) ('the Act') empowers the Minister to make regulations to carry into effect the provisions of the Act. Specifically, s 24(2)(c) and (e) of the Act states that the regulations may prescribe the form of contracts and may regulate and prohibit the conditions and terms of any contract under the Act.

[18] In the exercise of the powers conferred to the Minister under s 24 of the Act, the Minister made the Housing Development (Control and Licensing) Regulations 1989 ('the 1989 Regulations'), which came into force on 1 April 1989.

[19] Regulation 11(1) of the 1989 Regulations states that:

> Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G and *where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building, in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H*. (Emphasis added.)

[20] In Schedule H, cll 25 and 29 provide that the delivery of vacant possession and completion of common facilities shall be completed within 36 months from the date of the agreement. However, in the present case, it can be seen under cll 25 and 27 of the SPA that the period of 36 months above has been varied to 42 months.

[21] According to the learned counsel for the appellant, the extension of time was granted by the Housing Controller before the execution of the SPA. The extension of time was granted pursuant to reg 11(3) of the 1989 Regulations, which states that:

> (3) Where the *Controller is satisfied* that *owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:*
>
> Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of vacant possession under the contract of sale or after the validity of any extension of time, if any, granted by the Controller. (Emphasis added.)

[22] Furthermore, the parties to the SPA had already agreed that the period for the delivery of vacant possession and completion of common facilities would be 42 months. No objection was mounted on this issue in the proceeding below.

[23] However, in light of the recent Federal Court case of *Ang Ming Lee & Ors v Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor and other appeals* [2020] 1 MLJ 281; [2020] 1 CLJ 162, reg 11(3) of the 1989 Regulations was held to be ultra vires of the Act. As a result, the Housing Controller has no power to waive or modify any provisions in the Schedule H agreement. *Ang Ming Lee* is the latest Federal Court decision on this issue and is still a good law.

[24] In the present case, the learned HCJ had taken cognisance of the issue of illegality based on the above, even though the parties did not allude to any illegality before him. We believe the learned HCJ was entitled to do so.

[25] This is because even though the parties did not allude to the issue of illegality, the court is duty-bound to take cognisance of illegality, as the court should not knowingly be a party to the enforcement of an unlawful agreement.

[26] We agree with the learned HCJ who relied on the decision by the Privy Council in *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 MLJ 457; [1989] 1 CLJ Rep 1 in which it was held that:

> It is well established as a general principle that the illegality of an agreement sued upon is a matter of which the *court is obliged*, once it is appraised of facts tending to support the suggestion, *to take notice ex proprio motu* and even though not pleaded (see eg *Edler v Auerbach* [1950] 1 KB 359) *for clearly, no court could knowingly be party to the enforcement of an unlawful agreement.* (Emphasis added.)

[27] In a similar tone, the Federal Court in *Merong Mahawangsa Sdn Bhd &*

Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212 through Jeffrey Tan FCJ (as he then was) comprehensively concluded that:

> Clearly, therefore, *courts are bound at all stages to take notice of illegality*, whether ex facie or which later appears, *even though not pleaded, and to refuse to enforce the contract*. (Emphasis added.)

[28] As a result, the learned HCJ decided that the 36 month period as stipulated in Schedule H for the delivery of vacant possession and the completion of the common facilities shall apply to the SPA as statutorily and mandatorily required by reg 11(1) of the 1989 Regulations. We see no reason to disturb the findings of the learned HCJ above.

[29] Parties have each obtained their respective benefits from the SPA, and the only matter for consideration would be the computation and award of liquidated damages to the second and third respondents.

[30] The learned HCJ had exercised his discretion to order the appellant to pay liquidated damages to the second and third respondents for the late delivery of vacant possession of the unit and the late completion of the common facilities, even though the learned HCJ had issued a certiorari to quash the first respondent's award due to illegality and irrationality. This discretion was exercised under s 25(1), 25(2) and para 1 of the Schedule to the Courts of Judicature Act 1964 (Revised 1972) (Act 91) and O 1A, O 2 r 1(2) and O 53 r 2(3) of the ROC 2012.

[31] We have perused the appeal records and the grounds of the learned HCJ's decision. In awarding the sum of RM39,327.10 to be paid by the appellant to the second and third respondents, the learned HCJ had considered and less the rebate (which was not considered by the first respondent in its award), and the 36 month period was to commence from the date of the SPA. We believe that the learned HCJ's decision above is just and reasonable.

[32] In a nutshell, we do not agree with the submission by the learned counsel for the appellant on this issue and found this issue to be devoid of merits.

CONCLUSION

[33] After perusing the appeal records and hearing the submissions of the respective parties to this appeal, we have reached a unanimous decision. We have dismissed the appeal. As such, the decision of the High Court was affirmed. Parties were further ordered to bear their own costs.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh